

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WP227 No.552 of 2018**

Murari Lal Gupta S/o Late Shri Durga Prasad Gupta, Aged about 67 years, R/o-In Front of Dharam Hospital, Sadar Bazar, Tehsil & District-Bilaspur (CG)

----Petitioner

Versus

1-A. Digvijay Singh S/o Late Shri Talwar Singh,

1-B. Raghvendra Singh S/o Late Shri Talwar Singh,

Both R/o-Vinoba Nagar, Sahgal Gulley, Bilaspur, District-Bilaspur (CG)

---- Respondents

For Petitioner	:	Mr.Achyut Tiwari, Advocate
For Respondents	:	Mr.K. Rohan, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board**04/01/2019**

1. The petitioner was plaintiff before the trial Court. He had filed a suit on 25.10.96 in which the defendants herein took 11 years in filing written statement as it was filed on 9.4.2007, issues were framed on 11.7.2007 and ultimately the trial Court fixed the case for evidence on 3.5.2007. The said suit was adjourned for evidence on 10.5.2007. On 10.5.2007, the plaintiff filed an application under Order 17 Rule 1 of the CPC for adjournment as his witnesses were not present. That application was rejected and suit was dismissed under Order 17 Rule 2 of the CPC. For restoration of suit, the plaintiff filed an application under Order 9 Rule 4 read with Section

151 of the CPC. That application was rejected by the trial Court by the impugned order holding that since the suit has been dismissed under Order 17 Rule 2 of the CPC, which is revisable order and application under Order 9 Rule 4 of the CPC read with Section 151 of the CPC is not maintainable, which has been questioned by the petitioner/plaintiff in this writ petition.

2. Mr. Achyut Tiwari, learned counsel for the petitioner/plaintiff, would submit that the trial Court is absolutely unjustified in rejecting the application as it was the application under Order 9 Rule 9 of the CPC, which ought to have entertained by the trial Court.
3. On the other hand, Mr. K. Rohan, learned counsel for the respondents, would submit that application under Order 9 Rule 4 of the CPC was not maintainable and it has rightly been held so by the trial Court as remedy of the plaintiff is to file an application under Order 9 Rule 9 of the CPC.
4. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the record with utmost circumspection.
5. The suit was fixed for evidence of the plaintiff on 10.5.2007, on that day, the plaintiff did not appear personally, he was represented by his counsel, he filed an application under Order 17 Rule 1 of the CPC for adjournment, that application was rejected and the trial

Court held that the suit is dismissed under Order 17 Rule 2 of the CPC.

6. Order 17 Rule 3(b) of the CPC provides that if the parties are, or any of them is absent, the Court may proceed under rule 2. Order 17 Rule 2 of the CPC provides that where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit. Explanation attached gives the jurisdiction to the Court where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.
7. In the present case, since on 10.5.2007 the plaintiff's evidence had not commenced, therefore, there was no evidence on record to proceed to decide the suit on merits. So the trial Court had no discretion except to proceed under Order 9 for dismissal of the suit in absence of the plaintiff or his witnesses. Therefore, dismissal of the suit would be under Order 9 Rule 8 of the CPC and remedy of the petitioner/plaintiff was to file an application under Order 9 Rule 9 of the CPC.

8. It is well settled principle of law that mentioning of wrong provision or non-mentioning of any provision of law, would by itself, be sufficient to take away the jurisdiction of a court if it is otherwise vested in it in law. The Court will merely consider whether it has the source to exercise such power or not. (See **J. Kumaradasan Nair and another v. Iric Sohan and others**¹).
9. In this case, the plaintiff did file an application under Order 9 Rule 4 of the CPC for restoration of the suit and main prayer and contents of the application clearly show that this was only an application for restoration of suit filed under Order 9 Rule 9 of the CPC, which the trial Court failed to understand and misconstrued that dismissal is revisable under Section 115 of the CPC, therefore, revision would be maintainable. Since it was dismissal under Order 9 Rule 8 of the CPC read with Order 17 Rule 2 of the CPC, remedy of the plaintiff was to file an application under Order 9 Rule 9 of the CPC and that has rightly been filed by the plaintiff but under Order 9 Rule 4 CPC which could have been treated to be filed under Order 9 Rule 9 of the CPC by the trial Court and could have decided that application, as such, the impugned order is set aside.
10. Now the question is whether this Court should remit the matter for hearing the application for restoration afresh or should decide the application itself.

¹ (2009) 12 SCC 175

11. Since the suit was filed on 25.10.96, it would not be appropriate for this Court to remit the application for restoration to the trial Court under Order 9 Rule 9 of the CPC for decision. Sufficient cause has to be shown for his non-appearance when the suit was called out for hearing.

12. Considering the contents of the application, reason assigned and considering the medical report of the plaintiff, it cannot be held that no sufficient cause has been shown for non-appearance of the plaintiff when the suit was called out for hearing on 10.5.2007. Accordingly, the order dated 10.5.2007 is set aside and Civil Suit No.482A/98 (Murarilal Gupta v. Talwar Singh Thakur) is restored to its original file for hearing and disposal in accordance with law. The trial Court is directed to conclude the trial within three months from the date of receipt of certified copy of this order as the suit is pending since 25.6.96. A copy of this order be sent to the trial Court by fax/e-mail.

13. The writ petition is allowed to the extent indicated hereinabove. No cost(s). Copy of order be sent to trial court by fax & E-mail.

Sd/-

(Sanjay K.Agrawal)
Judge